

Internal Revenue Service  
**memorandum**

CC:FS:TL-N-408-92

CORP:LEGardner

date: NOV 8 1991

to: District Counsel, Manhattan CC:MAN  
Attn: Diane Heller

from: Assistant Chief Counsel (Field Service) CC:FS

subject: [REDACTED]

This is a written response to your request for Field Service Advice, dated September 11, 1991.

ISSUE

Which corporate member of the consolidated group, [REDACTED], is the proper party to execute the Form 872 waiver to extend the period of limitations with respect to the group's tax year ended [REDACTED].

RECOMMENDATION

In order to protect the position of the Service with respect to the year ended [REDACTED], we advise the district director to take the various steps described below.

FACTS

[REDACTED] and its subsidiaries filed income tax returns on a consolidated basis for the years [REDACTED] and [REDACTED]. On [REDACTED], [REDACTED], a Delaware corporation (EIN #: [REDACTED]) (hereinafter "[REDACTED]"), transferred all of its assets and liabilities to a new company, [REDACTED], a Delaware corporation (EIN #: [REDACTED]) (hereinafter "[REDACTED]"), in exchange for all the issued and outstanding ([REDACTED]) shares of common stock of [REDACTED] and a promissory note in the principal amount of \$[REDACTED]. On the same day, [REDACTED] liquidated, distributing the shares of [REDACTED] and the note to the sole shareholder of [REDACTED], a United Kingdom company. The transaction was represented as a tax-free reorganization under section 368(a)(1)(D). We note that this characterization has not been disputed.

Even though [REDACTED] has liquidated, you have indicated that the corporation has not formally dissolved. According to the office of the Secretary of State of the State of Delaware, [REDACTED] has not paid franchise taxes which are due. Under section 277 of the Delaware Code, no corporation shall be dissolved until all

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franchise taxes due to the State have been paid by the corporation. DEL. CODE ANN. tit. 8, § 277 (1983). However, under section 510 of the Delaware Code, if a corporation neglects or refuses for one year to pay the State any franchise taxes which the corporation is required to pay, then the charter of the corporation shall be void. DEL. CODE ANN. tit. 8, § 510 (1983). According to the office of the Secretary of State, [REDACTED]'s charter will be declared void in [REDACTED]. Therefore, [REDACTED] cannot dissolve until [REDACTED] pays the outstanding franchise taxes or until the charter is declared void in [REDACTED].

We assume that there was a formal agreement between [REDACTED] and [REDACTED] with respect to the transaction, dated [REDACTED], in which [REDACTED] expressly assumed the liabilities of [REDACTED]. As such, [REDACTED] is liable as a transferee of [REDACTED]. Please verify this assumption, since our advice is predicated on this fact.

[REDACTED] and its subsidiaries filed a consolidated income tax return for the year [REDACTED] on [REDACTED]. The taxpayer has treated [REDACTED] as the common parent agent for the consolidated group for that year. In [REDACTED], the president of [REDACTED] gave a power of attorney to [REDACTED] and [REDACTED] to represent [REDACTED] in any tax matters for the year [REDACTED] (Form 2848). On [REDACTED], after [REDACTED] had been liquidated, [REDACTED] signed a Form 872 waiver extending the period of limitations for the year [REDACTED] to [REDACTED].

[REDACTED] and its subsidiaries filed a consolidated income tax return for the year [REDACTED] on [REDACTED]. We note that on the return for that year, the return was filed in the name of [REDACTED] and subsidiaries.<sup>1</sup> However, the EIN number on the return (EIN # [REDACTED]) is the EIN number for [REDACTED]. The revenue agent involved in this case told us that the taxpayer listed the wrong EIN number on the return. Therefore, we are assuming that [REDACTED] filed the return as agent for the group.

Further information was provided by the revenue agent in this case to the effect that on [REDACTED], [REDACTED] percent of the stock of [REDACTED] was sold by [REDACTED] to an unrelated corporation, [REDACTED]. With this transaction, [REDACTED] and its subsidiaries became part of a new consolidated group for the following return year. The consolidated return for that year was filed by [REDACTED]. According to the office of the Secretary of State of the State of Delaware, [REDACTED] is currently an active corporation.

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<sup>1</sup> If the return was filed in the name of the wrong party, then it could be asserted that no return was even filed. As such, the tax could be assessed at any time, pursuant to section 6501(c)(3).

The [REDACTED] group's [REDACTED] and [REDACTED] returns are being audited. Your office has requested our advice as to which corporation(s) of the consolidated group is the proper party to execute the Form 872 waiver to extend the period of limitations for the year [REDACTED].

### DISCUSSION

The common parent of a consolidated group is the sole agent for each subsidiary in the group. Treas. Reg. § 1.1502-77(a). Thus, generally, the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Generally, the common parent for a particular consolidated return year remains the common parent agent for purposes of extending the period of limitations with respect to that year even though that corporation is no longer the common parent of that group when some action, such as an extension, needs to be taken for that year.

There are exceptions to this general rule. First, the general rule does not apply when the common parent is not in existence at the time such action is necessary. The common parent is considered to have gone out of existence when it formally dissolves under state law or merges into another corporation.

According to the facts, [REDACTED] has not formally dissolved. If [REDACTED] does not dissolve prior to obtaining a Form 872, then this exception would not apply. However, it is conceivable that [REDACTED] might pay the outstanding franchise taxes prior to [REDACTED], and following such payment, dissolve the corporation. That is, [REDACTED] may go out of existence, i.e., dissolve prior to obtaining a Form 872. Your office should advise the revenue agent seeking to obtain the Form 872 from [REDACTED] to verify with the office of the Secretary of State of the State of Delaware whether or not [REDACTED] has dissolved.

Second, the general rule does not apply when the consolidated return group undergoes a reverse acquisition following the consolidated tax year in question.<sup>2</sup> A reverse acquisition, as defined in Treas. Reg. § 1.1502-75(d)(3), occurs when the common parent or any member of its consolidated return group (the acquiring corporation) acquires the stock or substantially all the assets of another corporation (the acquired corporation) and, after the acquisition, the shareholders of the acquired corporation as a result of owning stock of the acquired

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<sup>2</sup> Although not relevant here, the general rule arguably also does not apply when there is a downstream transfer of the parent's assets or the parent undergoes an "F" reorganization, pursuant to Treas. Reg. § 1.1502-75(d)(2).

corporation (immediately before the acquisition) own (immediately after the acquisition) more than 50 percent of the fair market value of the outstanding stock of the acquiring corporation.

In the instant case, [REDACTED], the acquiring corporation, acquired substantially all the assets of [REDACTED], the acquired corporation, in exchange for the stock of [REDACTED] and a note from [REDACTED]. Furthermore, the stockholder of [REDACTED], [REDACTED], as a result of owning stock of [REDACTED] (immediately before the acquisition), owned (immediately after the acquisition) more than [REDACTED] percent of the fair market value of the outstanding stock of [REDACTED]. Therefore, we conclude that the consolidated group of [REDACTED] and subsidiaries underwent a reverse acquisition on [REDACTED].

In the case of a reverse acquisition, the answer to which corporation is the proper party to execute a Form 872 may depend on whether the old common parent went out of existence prior to taking the action to obtain a Form 872. If [REDACTED] went out of existence prior to taking action to obtain a Form 872, the rule in Southern Pacific would apply. In Southern Pacific Co. v. Commissioner, 84 T.C. 375 (1985), the old common parent went out of existence as part of a reverse acquisition. The Service's position in this case was that the new common parent would be the common parent agent not only for years subsequent to the reverse acquisition but also for years prior to the acquisition. The Tax Court in Southern Pacific agreed. If the rule in Southern Pacific applied, the new common parent, [REDACTED], would be the common parent agent of the continuing group for years prior to, as well as subsequent to, the reverse acquisition. Therefore, [REDACTED] would be the proper party to execute the Form 872 waiver to extend the period of limitations for the years [REDACTED] and [REDACTED].

However, as long as [REDACTED] remains in existence when a Form 872 is obtained from [REDACTED], then the rule in Southern Pacific might not apply. This office has taken the position that the holding in Southern Pacific only applies where the old common parent goes out of existence in a reverse acquisition. Where the old common parent remains in existence after a reverse acquisition, the position of this office is that the old common parent remains as the proper agent to execute consents for pre-transactional years, pursuant to Treas. Reg. § 1.1502-77(a). Hence, in applying this position to the instant case, [REDACTED] would be the proper party to execute the Form 872's for the years [REDACTED] and [REDACTED] (the pre-transactional years).

Yet, the above-described limitation on the holding of Southern Pacific has not been tested in any court. In addition, the primary rule of Southern Pacific has not been tested in any appellate forum. Due to the uncertainty in this area, this office has adopted a precautionary approach with respect to such cases. In such cases, the Service chooses to deal directly with the individual members of the consolidated group. Pursuant to

Treas. Reg. § 1.1502-77(d), when the common parent goes out of existence and does not designate another member to act as agent for the group and the remaining members of the group do not designate such an agent, then the district director may choose to deal directly with any member in respect to its liability. If the parent remains in existence and the Service wishes to deal directly with the members of the group, it must first notify the common parent that it has chosen to deal directly with these members. Therefore, when there is a question as to whether the common parent is still in existence at the time an action needs to be taken, it is usually advisable to deal with each member of the group separately after sending notification to any possible common parent of such intention. See Treas. Reg. § 1.1502-77(d) and the last sentence of Treas. Reg. § 1.1502-77(a).<sup>3</sup>

We have listed below the steps that we recommend be taken by the district director with respect to each year.

THE [REDACTED] TAX YEAR

The [REDACTED] return was filed on [REDACTED]. Pursuant to section 6501(a), the period of limitations for assessment of the taxpayer's income tax expires three years after the return is filed, i.e., [REDACTED]. Your office indicated to us that the period of limitations expires on [REDACTED]. We assume that this was based on an assumption that the return was filed on [REDACTED]. The Form 872's for the year [REDACTED] should be obtained prior to [REDACTED].

(1) In a letter, the district director should notify the old common parent, [REDACTED], that the district director has chosen to deal separately with each member of the group with respect to each member's several liability for the consolidated group's tax for the year [REDACTED]. The notice should indicate the consolidated group's name, i.e., [REDACTED], the name of each of the subsidiary members to be dealt with on a separate basis and the tax years for which such notification applies. See Treas. Reg. § 1.1502-77(a) (last sentence).

(2) In a letter, the district director should also notify the new common parent, [REDACTED], that the district director has chosen to deal separately with each member of the group with respect to each member's several liability for the consolidated group's tax for the year [REDACTED]. The notice should indicate the consolidated group's name, i.e., [REDACTED], the name of each of the subsidiary

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<sup>3</sup> Pursuant to Treas. Reg. § 1.1502-6(a), the common parent and each subsidiary in the group are each severally liable for the total tax liability of the consolidated group.

members to be dealt with on a separate basis and the tax years for which such notification applies. See Treas. Reg. § 1.1502-77(a) (last sentence).

(3) The district director should obtain a Form 872 from [REDACTED], with respect to [REDACTED]'s several liability for the entire consolidated tax for the year [REDACTED].

(4) The district director should obtain a Form 872 from [REDACTED], as the successor to [REDACTED], with respect to [REDACTED]'s several liability for the entire consolidated tax for the year [REDACTED].

(5) The district director should obtain separate Form 872's from as many subsidiaries as the district director deems necessary to assure that there are sufficient assets to satisfy the total tax liability of the group, with respect to the year [REDACTED]. These forms should each indicate that such consent is with respect to the subsidiary's several liability for the entire consolidated tax of the affiliated group, [REDACTED], for the year [REDACTED].

(6) In order to protect the Service's position in case the Form 872 for the year [REDACTED] is later held to be invalid, we advise you to obtain a Form 2045 from [REDACTED] in order for [REDACTED] to admit to its status as a transferee and also to obtain a Form 977 (a consent to extend the statute for transferee liability) from [REDACTED], as a transferee of [REDACTED], with regard to [REDACTED]'s consolidated tax liability, and to do this prior to [REDACTED]. The [REDACTED] return was filed on [REDACTED]. Pursuant to section 6501(a), the period of limitations for assessment of the taxpayer's income tax expires three years after the return is filed, i.e., [REDACTED]. Pursuant to section 6901, the period of limitations for assessment of the tax liability of a transferee is one year after the expiration of the period of limitations for assessment against the transferor, i.e., [REDACTED].

#### THE [REDACTED] TAX YEAR

On [REDACTED], [REDACTED], having the power of attorney to act on behalf of the corporation in tax matters for the year [REDACTED], signed a Form 872 waiver extending the period of limitations for the year [REDACTED] to [REDACTED]. Your office has not requested us to determine whether the Form 872 for the year [REDACTED] is valid. However, we want to notify your office that the validity of the Form 872 for the year [REDACTED] could be subject to challenge. The taxpayer may argue that [REDACTED] was not the proper party to execute the Form 872 for that tax year. There may be some question regarding when [REDACTED] went out of existence. The rule in Southern Pacific arguably may or may not apply depending on the answer to this question. If the taxpayer does


challenge the validity of Form 872 for the year [REDACTED], please contact our office for advice.

The [REDACTED] return was filed on [REDACTED]. Pursuant to section 6501(a), the period of limitations for assessment of the taxpayer's income tax expires three years after the return is filed, i.e., [REDACTED]. The execution of the Form 872, assuming it is valid, extends the period of limitations to [REDACTED]. In order to protect the Service's position in case the Form 872 for the year [REDACTED] is later held to be invalid, we advise you to obtain Forms 977 and 2045 from [REDACTED] for its transferee liability with regard to [REDACTED]'s [REDACTED] consolidated tax liability prior to [REDACTED]. The period of limitations for assessment of transferee liability is one year after the expiration of the period of limitations for assessment against the transferor pursuant to section 6901. Therefore, the period of limitations for assessing transferee liability, without having previously obtained an extension, expires [REDACTED]. If the Form 872 is valid, the period of limitations for transferee liability will not expire until [REDACTED].

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If you have any questions regarding this matter, please contact Lorraine E. Gardner at (FTS) 566-3335.

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